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Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-861

EAST CARROLL PARISH SCHOOL BOARD, *et al.*,

Petitioners,

v.

STEWART MARSHALL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

Questions Presented

1. Did the district court violate *Connor* v. *Waller*, 44 L.Ed. 2d 486 (1975), by approving the use of at-large elections which had previously been enacted by both the State Legislature and the Parish but never submitted for approval under section 5 of the Voting Rights Act?

2. Should the district court have deferred to the primary jurisdiction of the Attorney General before approving a change from single member districts to at-large elections?

3. Was the district court's approval supported by the "persuasive justifications" required for a change from single member to at-large elections?

4. Did the district court apply the correct standard in determining whether the at-large plan discriminated against black voters in violation of the Fourteenth and Fifteenth Amendments?

5. Was the instant appeal from the district court's order of August 2, 1971, rendered moot by the district court's subsequent order of March 27, 1972?

Statutory Provisions Involved

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, provides in pertinent part:

> Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to a vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither . . . the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Summary of Argument

In November, 1968, after the then existing ward districting plan had been declared invalid, the East Carroll Police Jury adopted an at-large plan for election of the Police Jury and School Board. This change in election procedure was never submitted for approval under section 5 of the Voting Rights Act. This failure to comply with the Voting Rights Act is not excused by the fact that the at-large plan was adopted after the district court had invalidated the earlier districting plan. *Connor* v. *Waller,* 44 L.Ed. 2d 486 (1975).

When a redistricting plan is proposed to a federal court in a section 5 jurisdiction, the court should defer consideration of the plan until it has first been submitted to the Attorney General. The question of whether such a change in election laws has the purpose or effect of discriminating on the basis of race is within the primary jurisdiction of the Attorney General, who has extensive and unique experience in evaluating the discriminatory impact of redistricting plans. In the instant case the Attorney General had repeatedly indicated his desire that the East Carroll at-large plan be submitted for review under section 5. The district court erred in failing to defer to the primary jurisdiction of the Attorney General.

To the extent that the district court ordered the holding of at-large elections, it violated the rule that such at-large plans are to be avoided whenever feasible. *Chapman* v. *Meier,* 420 U.S. 1 (1975). The fashioning of single-member districts was clearly possible in this case, and they had been consistently used in the past. The district court's obligation to order single-member districts was not ended by the "adoption" of the at-large plan by the Police Jury, since the Police Jury had no authority to adopt such a plan.

The district court, in evaluating the constitutionality of the at-large plan, did not apply the standards subsequently articulated in *White* v. *Regester,* 412 U.S. 755 (1973). The district court applied a *per se* rule that at-large elections could never be discriminatory in a jurisdiction with a black population majority. But both the courts in *White* v. *Regester* and the Attorney General in administering the Voting Rights Act have concluded that, under certain circumstances, at-large elections can have a discriminatory effect in such a jurisdiction. Had the district court applied the correct standards to the facts before it in 1971, it would have held the at-large plan invalid. Since, however, there have been significant developments during the intervening years, the Court need not consider how the case should have been decided in 1971, but should direct the district court to apply the correct standard to the circumstances now in existence.

This appeal is from a decision of the district court of August 2, 1971, ordering the holding of at-large elections. On March 27, 1972, the district court concluded that, in the light of developments since its earlier decision, the at-large plan was indeed discriminatory, and ordered that subsequent elections be held on a ward basis. It is unnecessary for the Court to decide whether at-large elec-

tions could have been sustained, since the district court has now indicated it no longer wishes to order elections on that basis. This appeal is thus moot.

ARGUMENT

I.

The Decision of the District Court Is Inconsistent With Section 5 of the Voting Rights Act.

This action arose in the state of Louisiana, a jurisdiction subject to the special provisions of section 5 of the Voting Rights Act. Prior to 1968 members of the School Board and Police Jury in East Carroll Parish were elected from seven wards, six of them single member districts. The new election plan at issue in this appeal provides for election of all nine members on an at-large basis. That plan thus constitutes a change in voting practices and procedures. Such changes cannot normally be enforced unless first approved by the Attorney General or the United States District Court for the District of Columbia as required by section 5 of the Voting Rights Act. 42 U.S.C. §1973c. Since this case does not fall within the narrow exception delineated by *Connor* v. *Johnson,* 402 U.S. 690 (1971), the district court erred in approving the change to at-large elections.

1. The Rule of *Connor* v. *Waller.*

Connor v. *Johnson* held that a decree of a United States District Court "is not within reach of Section 5 of the Voting Rights Act." 402 U.S. at 691. The exception to section 5 established by *Connor* v. *Johnson* is a narrow one, and does not apply to changes in election laws which are fashioned or adopted by a state or local government and

subsequently submitted for approval to a local district court.

In *Connor* v. *Waller,* 44 L.Ed. 2d 486 (1975), the United States District Court for the Southern District of Mississippi had held invalid a 1971 state reapportionment plan on the ground that differences in the population of the districts violated equal protection. See *Connor* v. *Williams,* 404 U.S. 549 (1972). Subsequently the Mississippi legislature in 1975 adopted a new districting plan and submitted it for approval to the district court which had invalidated the earlier plan. The district court concluded that the 1975 redistricting was not subject to section 5 because adopted in the course of the reapportionment litigation. The district court therefore proceeded to consider, and reject, a claim that the 1975 plan discriminated on the basis of race.

On appeal this Court reversed. The Court concluded unanimously that the 1975 districting plan was a "legislative enactmen[t] required to be submitted pursuant to §5 of the Voting Rights Act." Because the statutes had been enacted by the state, they would not be effective "until and unless cleared pursuant to §5. The District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." 44 L.Ed. 2d at 486. The Court limited the authority of the district court under *Connor* v. *Johnson* to fashioning an interim plan for the 1975 elections. *Id.*

This case is indistinguishable from *Connor* v. *Waller.* Indeed, the Attorney General of Mississippi in *Connor* relied heavily on the holding of the original panel of the court of appeals in the instant case that section 5 did not apply to the East Carroll Parish plan:

> The Court of Appeals for the Fifth Circuit in a case on all-fours with the case *sub judice* regarding the Section 5 issue posed here, has interpreted this Court's ruling in *Connor* v. *Johnson,* 402 U.S. 690, that a district court decree is not within the reach of Section 5 of the Voting Rights Act of 1965, to include a situation identical to the situation and circumstances surrounding the Mississippi reapportionment plan. In *Zimmer* v. *McKeithen,* 467 F.2d 1381 (1972) . . . the court of appeals held that since the plan was prompted by the court order . . . neither the plan nor the decree was subject to Section 5 of the Voting Rights Act.[1]

The reasoning of *Connor* v. *Waller* applies *a fortiori* to the instant case, for in *Connor* v. *Waller* the plan adopted by the legislature was essentially the same as that fashioned earlier by the court, whereas in the instant case the at-large plan was both fashioned and adopted by the Police Jury.

The role of the district court in the initial adoption of the at-large plan was nominal at best. The original complaint alleging unconstitutional differences in the size of the East Carroll Parish wards was filed July 12, 1968. A 1-22. Less than a month later counsel for defendants virtually stipulated to judgment for plaintiffs invalidating the ward plan, A 33-36, and agreed "to reapportion" by a date set by the court. A 37-40. The district court issued no guidelines to the defendants for preparing a new

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[1] *Connor* v. *Waller,* No. A-968, October Term, 1974, Memorandum Brief of Appellees on the Applicability of Section 5 of the Voting Rights Act, pp. 5-6. The instant case was decided by the court of appeals *sub nom. Zimmer* v. *McKeithen.* The author of the original panel decision in this case, who concluded that section 5 did not apply, was the same judge who erroneously ruled, as a member of the three judge court, that section 5 did not apply to the statute in *Connor* v. *Waller.* See *Connor* v. *Waller,* No. A-968, October Term, 1974, Supplemental Memorandum For Appellants, 2a-3a.

plan,[2] but merely directed them to "prepare and submit to this Court on or before October 1, 1968, a constitutionally satisfactory plan for the reapportionment." A 45. On November 18, 1968, the East Carroll Police Jury adopted a resolution establishing an at-large plan of election. A 57. The resolution was transmitted to the district court by the president of the Police Jury with the following explanation:

> In accordance with the order of Court, a resolution was *adopted* by East Carroll Parish Police Jury on November 18, 1968, setting forth a plan of reapportionment for East Carroll Parish, Louisiana, which the Police Jury asks you to *incorporate* in your forthcoming judgment on this matter. A 56 (Emphasis added).

No explanatory memorandum, statistics, or argument were submitted with the plan, which plaintiff did not oppose. Within a few days after the plan was submitted, and without any hearing, the district court ordered the plan into effect in an order approved, and apparently drafted, by counsel. A 50-51. In 1971, after permitting intervenor to challenge the jury's at-large plan, the district court reaffirmed its approval of the jury's plan. A 96.[3]

This case, as *Connor* v. *Waller,* involves a redistricting plan which was adopted by a state or local government

[2] The complaint was filed barely a month before primary elections scheduled for August 17, 1968. A 20. The plaintiff asked that the August 17 election be enjoined or held on an at-large basis. A 22. At the hearing of August 6, 1968, the district court ordered the August 17 election be at-large and directed the Police Jury to adopt a reapportionment plan of its own for subsequent elections. A 38.

[3] As in 1971, the Police Jury and the School Board again adopted resolutions, this time proposing that the earlier plan be kept in force. A 61. Counsel for the Police Jury explained that the resolutions "adopt the same plan of reapportionment under which these bodies have been acting since December 2, 1968." A 60.

and thus required approval under section 5. It is of no relevance to the Voting Rights Act that at the time the plan was enacted the Police Jury was under a court order to adopt some plan. Once the plan was adopted by the Police Jury, it could only be approved under the Voting Rights Act by the Attorney General or the District Court for the District of Columbia. The District Court for the Western District of Louisiana erred in both 1968 and 1971 in purporting to approve enforcement of the Police Jury's reapportionment plan without first requiring that it be considered under section 5.

2. Deference to the Attorney General.

The Attorney General of the United States, in administering section 5 of the Voting Rights Act, has primary jurisdiction over questions as to whether a redistricting plan in a section 5 jurisdiction has the effect of discriminating on the basis of race. When a redistricting plan is proposed to a federal district court in such a jurisdiction, the court should, under ordinary circumstances, defer consideration of that plan and its constitutionality until the plan has been reviewed and approved by the Attorney General under section 5.

In carrying out its responsibilities under the Act the Department of Justice has acquired unique expertise in assessing the discriminatory effect of districting plans. Since 1970 the Attorney General has scrutinized over 400 redistricting plans,[4] and the largest number of objections interposed by the Attorney General under section 5 have been to such plans.[5] A total of 58 redistricting plans in 9

[4] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 597 (1965).

[5] *Id.* 597-600 (Statement of J. Stanley Pottinger); S. Rep. No. 94-295, p. 18; H. Rep. No. 94-196, p. 10.

states were disapproved by the Attorney General between 1971 and 1975 on the grounds that they discriminated on the basis of race.[6] The Attorney General has developed detailed procedures for evaluating such plans,[7] and Justice Department employees are uniquely equipped to evaluate proposed redistricting through an understanding of the practical realities of the local situation and by drawing up alternative plans for comparison.[8] Under the Department of Justice procedures information concerning such submissions is disseminated to a number of interested groups and individuals and all persons and organizations are encouraged to bring to the attention of the Department any relevant information.[9] Where the Attorney General objects to a proposed plan the Department can and does offer informal assistance to the affected jurisdiction in preparing a nondiscriminatory plan.[10] The evaluation of election law changes under section 5 "is the highest priority of the Voting Section of the Department of Justice's Civil Rights Division." [11]

This Court has long held that, when a question arises within the expertise of a federal agency, the courts should in general defer action until the agency has had an opportunity to consider the matter. *Far East Conference* v.

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[6] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 403-409 (1975).

[7] See 28 C.F.R. §51.10.

[8] See Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 669-675 (1975).

[9] *Id.;* see 28 C.F.R. §§51.12-51.16.

[10] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 30 (1975).

[11] S. Rep. No. 94-295, p. 16.

United States, 342 U.S. 570 (1952). Such a deferral to the agency with primary jurisdiction is particularly appropriate "in cases raising issues of fact not within the conventional experience of judges," [12] where the agency has special competence or expertise,[13] or when it is necessary to protect the integrity of the regulatory scheme.[14]

When, in a federal district court in a jurisdiction subject to section 5 of the Voting Rights Act, the state or any other party proposes that the court order into operation a new "standard, practice or procedure with respect to voting," this doctrine of primary jurisdiction is normally applicable. Federal judges do not ordinarily have the unusual experience or expertise which the Attorney General and his staff have developed in administering the Voting Rights Act since 1965. In evaluating the potentially discriminatory effect of a proposed redistricting plan the Department of Justice is "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference* v. *United States,* 342 U.S. at 575. By referring such plans to the Attorney General the courts can assure that redistricting litigation is not used to undermine the scheme established by Congress to assure that changes in election procedure would not be put into operation until scrutinized under section 5.

Deferral to the Attorney General will also serve to reduce both the burden on the lower courts and their intru-

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[12] *Far East Conference* v. *United States,* 342 U.S. at 574.

[13] *United States* v. *Western P. R.R. Co.,* 352 U.S. 59 (1956); *Hewitt-Robins, Inc.* v. *Enstein Freight-Ways, Inc.,* 371 U.S. 84 (1962); *Amalgamated Meat Cutters, etc.* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334 (1963).

[14] *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 353 (1963).

sion into the process of fashioning redistricting plans. Under ordinary circumstances in a section 5 jurisdiction, a federal court which has held invalid the existing districting plan should direct the appropriate authorities to adopt a new plan and submit it to the Attorney General for approval. If the Attorney General interposes an objection to the new plan, no court consideration will be necessary, since such disapproval will automatically preclude implementation of the new plan.[15] Should the Attorney General not object to the new plan, the court will still be obligated to consider whether the plan meets the relevant constitutional standards, but it is likely that in many cases review by the Attorney General will serve to screen out plans which are constitutionally defective because discriminatory on the basis of race.

It is clear that Congress contemplated that the federal courts in section 5 jurisdictions would follow this procedure. The 1975 Senate Report explained that it believed *Connor* v. *Waller*.

> is consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court.
>
> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to

[15] Unless, of course, the jurisdiction obtains from the United States District Court for the District of Columbia the requisite declaratory judgment.

> adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.[16]

The Report noted that

> [a] correct application of Section 5, for example, was demonstrated in *Gaillard* v. *Young* (Civil Action No. 74-1265 D. South Carolina, 1975), which involved the reapportionment of the City Council of Charleston, S.C. The district court invalidated the existing apportionment plan on grounds of "population inequality" and then deferred consideration of any new plan pending Section 5 review. A number of plans were submitted to the Attorney General, who objected to all but one. That one was then submitted to the local district court which concluded that the plan would not meet the population equality requirements of the fourteenth amendment. The court then invited the litigants in the reapportionment case to present plans, and after selecting the one best meeting the population equality requirements of the fourteenth amendment, ordered that plan submitted for Section 5 review. Only after the Attorney General decided not to object to this last plan did the district court order it implemented.[17]

[16] S. Rep. No. 94-295, pp. 18-19.

[17] S. Rep. No. 94-295, p. 19.

The Committee stated that this was the appropriate procedure except where, because of a shortage of time, that procedure is not feasible and the court is forced to fashion by itself an interim plan.[18]

The instant case well illustrates the extent to which a local federal court which does not refer proposed plans to the Attorney General may inadvertently become a vehicle for evading of requirements and protection of section 5. Prior to 1968 Louisiana law did not permit the election of School Board or Police Jury members on an at-large basis, and they were chosen in East Carroll Parish from seven wards. On July 20, 1968, Louisiana adopted legislation permitting parishes to switch to at-large elections, Acts 445 and 561. Under the Voting Rights Act it was unlawful to implement these new provisions until approval pursuant to section 5; for months, however, Louisiana took no steps to comply with section 5 by submitting Acts 445 and 561 to the Attorney General. In the interim the instant lawsuit was filed against East Carroll Parish on July 12, 1968, by a white voter.[19] Counsel for the Parish promptly conceded, for all practical purposes, that the existing plan was illegal, and agreed to comply with a court order to adopt a new one.[20] On November 18, 1968, while

[18] "The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor* v. *Johnson*, 402 U.S. 690 (1971). Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required, *Connor* v. *Waller, supra*. Furthermore, in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." S. Rep. No. 94-295, p. 19.

[19] A 1.

[20] A 33-40.

implementation of Acts 445 and 561 was still unlawful, and the Voting Rights Act thus forbade the adoption of an at-large plan, the Police Jury adopted just such a plan and asked the district court to "incorporate" that at-large plan in its judgment.[21] The district court, without holding any hearing or considering any alternative, complied with this request on December 2, 1968.[22]

It was not until the spring of 1969 that Louisiana submitted Acts 445 and 561 to the Attorney General. The Attorney General disapproved these statutes on June 26, 1969.[23] On September 10, 1967, the Assistant Attorney General of the United States wrote to the Attorney General from Louisiana reminding him of that objection, noting that East Carroll Parish Police Jury had adopted on November 18, 1968, the very type of at-large plan disapproved, and citing the actual effect of that plan as an example of "diluting the actual or potential voting power of Negro inhabitants." No action was taken by Louisiana to rectify this violation of the Voting Rights Act. On August 7, 1970, the Assistant Attorney General wrote to the President of the East Carroll Parish Police Jury, stressing that the adoption of the 1968 at-large plan was unlawful and that it could not be implemented.[24] Again no action was taken to rectify this violation of the Voting Rights Act.

By July of 1971 the Department of Justice discovered that at least 70 parishes had, like East Carroll, unlawfully adopted and implemented at-large or other reapportion-

[21] A 56.

[22] A 50-51.

[23] The letter of disapproval is set out on pp. 6aa-7aa of the appendix to this brief.

[24] A 58-59.

ment plans under the disapproved Acts 445 and 561.[25] The Department wrote to the local district attorneys, including that for the judicial district encompassing East Carroll Parish, again insisting that such plans could not lawfully be implemented without section 5 approval.[26] At the time this letter was received there was pending before the district court yet another request that the court approve the plan "adopted" by East Carroll Parish in 1968.[27] The position of the Department of Justice was brought to the attention of the district court on July 19, 1971, and intervenors contended that the 1968 plan should be submitted to the Attorney General. On August 2, 1971, the District Court, without seeking or considering the views of the Attorney General or his repeated efforts to obtain submission of the 1968 plan, once again approved the plan.[28] Counsel for the Parish declined to submit the 1968 plan to the Attorney General on the ground that it had been "incorporated in a decree issued by" the district court.[29] Thereafter the state requested that the Attorney General withdraw his objections to Acts 445 and 561, which authorize adoption of at-large plans, by representing that each individual at-large

[25] Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 582 (1975).

[26] A 84-85.

[27] A 60.

[28] A 95-97. The district court's "order" of August 2, 1971, contains no consideration of the section 5 problem.

[29] A 93-94. The district court apparently instructed the Parish, in some *ex parte* manner, that it need not comply with section 5. On July 19, 1971, counsel for the Parish wrote the Court asking "clarification" of how it should respond to the Justice Department's letter. A 83. On July 22, 1971, counsel for the Parish wrote the Department that he had "conferred" with the judge, who had "advised" him that the at-large plan would not have to be submitted. A 94. No formal court proceeding occurred between July 19 and 22, and counsel for intervenors only learned of this conference months later. See A vi.

plan would be subject to section 5 scrutiny since "such plans or changes in the elective process must be submitted by the School Boards to either the District Court for the District of Columbia or to the Attorney General." [30]

This is more than just a case in which a district court inexplicable refused to defer to the primary jurisdiction or otherwise solicit or consider his views. At the very moment when the Attorney General was seeking to assert his jurisdiction over the at-large plan, the Parish sought[31] to destroy that jurisdiction by the expedient of "incorporating" the 1968 plan into a court order. The need to protect the primary authority of an agency "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]" *Federal Power Commission in Louisiana Power and Light Co.*, 406 U.S. 621, 647 (1972). It is unclear why the exercise of federal jurisdiction was necessary in this case at all; the Parish did not seriously dispute in 1968 the invalidity of its old plan and readily agreed to adopt a new one. The sole effect of this litigation seems to have been to obstruct review by the Attorney General of the change to at-large elections in East Carroll Parish; in view of the nominal role played by the white plaintiff in this case, there is reason to suspect that may have been or become its purpose.

There is evidence that, in the wake of this case, an effort was made to evade the requirements of section 5 by means

[30] See appendix, pp. 11aa-15aa. On April 14, 1972, the Attorney General withdrew his objections to Act 561 based on this "assurance" that all such plans would be submitted under section 5 and that the authority granted by Act 561 "would not be used by local jurisdictions to circumvent the requirements of the Voting Rights Act." See appendix, p. 16aa. Manifestly the withdrawal of the objection to Act 561 does not permit East Carroll Parish to adopt redistricting plans without section 5 approval.

[31] Unsuccessfully. See pp. 5-9, *supra*.

of redistricting litigation before the district judge involved in this case. Within three years after the filing of the instant complaint, the district judge "redistricted" at least 8 other parishes in Louisiana by incorporating in a decree a police jury or school board plan which was never cleared under section 5.[32] Although the Attorney General objected to every redistricting plan from Louisiana parish which involved a switch to at-large elections,[33] the judge approved 5 such at-large plans.[34] In one case the judge incorporated into a decree a police jury redistricting plan which had, prior to the litigation, been submitted to and rejected by the Attorney General.[35]

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[32] *Collins* v. *Day*, W.D. La., CA No. 10397 (Order dated July 29, 1968); *Wactor* v. *McKeithen*, W.D. La., CA No. 12663 (Order dated October 18, 1968); *Wyche* v. *Madison Parish Police Jury*, W.D. La., CA No. 14053 (Order dated April 7, 1971); *Humphrey* v. *Lincoln Parish Police Jury*, W.D. La., CA No. 13112 (Order dated July 29, 1970); *Turpin* v. *Natchitoches Parish Police Jury*, W.D. La., CA No. 14659 (Order dated July 13, 1971); *Whatley* v. *Union Parish Police Jury*, W.D. La., CA No. 17019 (Order dated July 29, 1971); *Bell* v. *Tensas Parish Police Jury*, W.D. La., CA No. 16670 (Order dated August 3, 1971); *Pipes* v. *Jackson Parish School Board*, W.D. La., CA No. 14424 (Order dated August 9, 1971). A number of these decisions were subsequently overturned by black intervenors.

[33] See Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 599 (1975).

[34] *Wyche* v. *Madison Parish Police Jury, supra; Humphrey* v. *Lincoln Parish Police Jury, supra; Wactor* v. *McKeithen, supra; Collins* v. *Day, supra;* A 50-51, 97.

[35] *Whately* v. *Union Parish Police Jury, supra.* The plan, which replaced single member districts with three multi-member districts, was adopted by the Police Jury on March 9, 1971, and rejected by the Attorney General on June 18, 1971. On July 29, 1971, the following documents were filed simultaneously in the United States District Court for the Western District of Louisiana: the complaint, an answer admitting the pre-1971 plan was invalid, a joint motion by plaintiff and the defendant police jury asking the district court to adopt a plan identical to that enacted on March 9, 1971, and an order signed by Judge Dawkins ordering that plan into effect. Judge Dawkins' order was signed on July 28, 1971. A certified copy of the record in this case is being lodged with the court.

Ten months after the swift litigation in *Whately*, the plan involved was declared unconstitutional in *Collins* v. *Union Parish Police Jury*, W.D. La., CA No. 17641 (Order dated May 24, 1972).

II.

The Decision of the District Court Is Inconsistent With *Chapman* v. *Meier*, 420 U.S. 1 (1975).

In *Chapman* v. *Meier*, 420 U.S. 1 (1975), the Court held that, in the absence of unusual circumstances, "a court ordered reapportionment plan must avoid the use of multi-member districts." 420 U.S. at 27. The Court noted that multi-member districts involve a number of practical weaknesses. First, as the number of seats within the district increases, the difficulty for the voter in making intelligent choices among candidates increases. Second, residents of particular areas within the district may feel, with justification, that they have no representative specially responsible to them. Third, bloc voting by certain groups of voters may tend to dilute the votes of others. 420 U.S. at 15-16. The decision in *Chapman* reaffirmed the earlier holding in *Connor* v. *Williams*, 404 U.S. 549, 551 (1972), and *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971), that when district courts "fashion apportionment plans, single member districts are preferable to large multi-member districts as a general matter." 420 U.S. at 18.

The *Chapman* rule applies *a fortiori* in the instant case. In *Chapman* only one third of the State Senate was to be chosen from multi-member districts. 420 U.S. at 13. Under the plan approved by the district court in this case all of the 9 members of the Police Jury and all of the 9 members of the School Board are to be chosen at-large. In *Chapman* the average multi-member district had less than

4 representatives; in the instant case the Police Jury "district" and School Board "district" have 9 "at-large" members. Although the state of North Dakota had had an established state policy of electing members of the state House on an at-large basis, the Court refused to permit the extension of that policy to Senate elections. East Carroll Parish, by contrast, had never elected members of the Police Jury and School Board on an at-large basis.

Chapman held that federal courts should order single-member districts unless special circumstances, alternatively characterized by the Court as "particularly pressing features," "pervasive justifications," and "insurmountable difficulties," were present. 420 U.S. at 18, 19, 26; see also *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971). If a court orders a multi-member district or districts it must "articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted." 420 U.S. at 27. The district court in the instant case offered no such justification. In its decision of December 2, 1968, ordering at-large elections, the court gave no explanation for so doing.[36] In its decision of August 2, 1971, the court gave as its reason for preferring the at-large plan that "it offers a zero deviation while all other plans did not."[37] That, of course, does not constitute a special circumstance, since under *all* at-large plans there are no districts to differ in size and thus zero deviation is always present. The district court did not hold, and the counsel for the Parish never urged, that it would not have been possible to fashion a single-member district plan.

If, after the district court held unconstitutional the districting plan in effect prior to 1968, the Parish had enacted

[36] A 50-51.

[37] A 96.

valid legislation creating a single at-large district or any other constitutional plan, the role of the district court would have been at an end and *Chapman* would not control. But both in 1968, when the Police Jury first purported to adopt the at-large plan, and in 1971, when it purported to readopt that plan, the Police Jury had no authority to fashion or approve such an at-large plan, since Acts 445 and 561 which purported to create such authority, had not received the requisite Section 5 approval.[38] Even if Acts 445 and 561 had had section 5 approval in 1968 or 1971, the at-large scheme would not have been valid until and unless that scheme had been approved under section 5, which it never was.

III.

The District Court Did Not Apply the Correct Standard in Determining Whether the At-Large Plan Discriminated Against Black Voters.

In its decree of December 2, 1968, which first approved the East Carroll at-large plan, the district court gave no reasons for the adoption of that particular plan.[39] On July 29, 1971, at the conclusion of the hearing on the plan to be used in light of the 1970 census, the district court issued from the bench a one sentence opinion ordering use of the existing at-large plan.[40] On August 2, 1971, the district court entered a decree, apparently prepared by counsel for the

[38] The unauthorized adoption of the at-large plan by the Police Jury is as insufficient a justification for the district court's order as was the adoption by the North Dakota Legislature of a multi-member district plan rejected by the voters at a subsequent referendum.

[39] A 50-51.

[40] A 179.

Parish,[41] which included a brief statement as to the reasons for ordering at-large elections.[42] Compare *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964). Neither the decrees nor the brief opinion are, or purport to be, the findings of fact and conclusions of law required to assist appellate review. Rule 52, Federal Rules of Civil Procedure. To the extent that it is possible to glean the district court's reason for approving the at-large plan, it is clear that the court did not apply the correct standard in determining whether that plan was impermissibly discriminatory.

The key reason which led the district court to conclude that the at-large plan was non-discriminatory seems to have been the fact that 58.7 per cent of the population of East Carroll Parish was black.[43] The court of appeals understood the district court to have applied a *per se* rule that an at-large plan could not dilute minority voting strength whenever non-whites were more than half the population.[44] It cannot, however, be conclusively presumed that blacks can or will have a meaningful opportunity to participate in the political process merely because they are a majority of the total population. Even where blacks are a majority of the total population, they are often a significantly smaller portion of the voting age population; both nationally[45] and

[41] The decree recites that it is "approved as to form" by counsel for the Parish. A 97. It would appear that the Decree was actually typed on the same typewriter used to prepare the briefs filed by counsel for the Parish. *Compare* A 95-97 *with* A 78-82, A 87-89.

[42] A 95-97.

[43] A 96, 179.

[44] Petition 50.

[45] Statistical Abstract of the United States: 1973, Table 38, p. 33. As of 1970 57.9% of blacks were 18 or over, compared to 66.8% of whites.

in East Carroll Parish[46] a larger proportion of the white population is of voting age. Even where blacks are a majority of the voting age population, they may nonetheless be a minority of the registered voters due to past or present discrimination in registration, or in areas such as education which tend to produce low registration. *Graves* v. *Barnes*, 343 F. Supp. 704, 733 (W.D. Tex. 1972), *aff'd sub nom. White* v. *Regester*, 412 U.S. 755 (1973).[47] Even if whites were a minority of registered voters, a variety of stratagems might be successfully employed to prevent the election of black candidates or meaningful participation by black voters.[48] None of these problems were considered by the district court.

[46] Petition 34, n. 1. As of 1970 51.4% of blacks were 18 or over, compared to 61.5% of whites.

[47] In 1975 the United States Commission on Civil Rights reported allegations of harassment of registration activities in East Carroll Parish. The Voting Rights Act: Ten Years After, 187 (1975). The Commission also reported that the registration rate among blacks was lower than that among whites in 64 of Louisiana's 66 parishes, including East Carroll. *Id.*, 366-68. As of 1971 whites constituted a majority of the registered voters in East Carroll Parish, and the lower black registration rate was doubtless due in part to the fact that, prior to 1962, no black resident of the Parish had been permitted to register.

[48] See United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 97-319 (1975). The cost of a campaign in an at-large district is invariably substantially more expensive than in a single member district. See *Graves* v. *Barnes*, 343 F. Supp. 704, 732 (W.D. Tex. 1972), *aff'd sub nom. White* v. *Regester*, 412 U.S. 755 (1973). In East Carroll Parish, the cost of mailing a letter to every registered voter would be nine times greater in the at-large district than in a single member district. This increased cost will invariably work to the disadvantage of black candidates and their supporters, who are uniformly less affluent than whites. In 1971 the median income of black families in the southern states was 5,414, less than 60% of the white median of $9,706. Statistical Abstract of the United States, 1973, Table 534, p. 329. In 1970 the median income of black families in East Carroll Parish was $2437, compared to $4818 for whites. United States Census: 1970, General Social and Economic Characteristics, Louisiana, Tables 124, 128, pp. 344, 368.

In *White* v. *Regester*, 412 U.S. 755 (1973), this Court sustained a decision invalidating a multi-member district for Bexar County, Texas, on the ground that it discriminated against Mexican-Americans. Mexican-Americans constituted a majority of the county population. See *Graves* v. *Barnes*, 343 F. Supp. 704, 730, 733 (W.D. Tex. 1972). The Attorney General has also recognized that an at-large plan may dilute black votes even though blacks constitute a majority of the population. Among the Louisiana parishes other than East Carroll with a black population majority, three adopted at-large districting plans in 1971 and submitted them for scrutiny under section 5. The Attorney General, after reviewing the political and social realities involved, interposed an objection to each of these plans.[49] It is clear that the district court erred in conclusively presuming that the use of at-large elections could not have an adverse effect on blacks.

So far as can be discerned from the record, this ill-conceived *per se* rule seems to have been the sole basis for the decision of the district court. Although the decree drafted by counsel for the Parish recites in a conclusory manner that the at-large plan does not discriminate against, or dilute the votes of, blacks, this appears to be merely the inevitable conclusion dictated by the court's *per se* rule.[50] There is ample evidence in the record of a long history of racial discrimination in East Carroll Parish, both in voting

[49] The three parishes were St. Helena, Desoto and East Feliciana. See United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 405 (1975).

[50] A 96. Paragraph 3 of the decree recites that the at-large plan "does not dilute nor discriminate against the black population as the new [sic] voting unit from which officers of the jury and the board are to be elected is composed of 58.7 percent blacks, or a substantial majority of blacks." The term "as" is clearly used to mean "because".

registration[51] and education,[52] a factor of substantial importance under *White* v. *Regester*, 412 U.S. 755, 766, 768 (1973). The district court, sitting two years before *White*, regarded such evidence as irrelevant.[53] Apparently because the district judge believed the population statistics conclusive, neither the decrees nor his remarks from the bench contain any consideration of other factors of central importance under *White* v. *Regester*, including the result of elections held on an at-large basis,[54] the imposition of a "place" rule by means of a residence requirement,[55] or the

[51] Petition, 45.

[52] Petition, 14.

[53] When counsel for intervenor sought to introduce evidence of that history of discrimination, the Court objected, "There is no Court Case holding in the Fifth Circuit or the Supreme Court or otherwise that because of any past political history you have got to give that consideration." A 159.

[54] Prior to the adoption of the at-large system wards 1 and 3 had a particularly large black population. In 1966 a black candidate was elected to membership on the school board from ward 3. In 1967 blacks were elected to the police jury from wards 1 and 3. In 1970, under the at-large plan, black candidates for the school board from wards 1 and 3 were both defeated. Letter of Jerris Leonard to Hon. Jack Gremillion, September 10, 1969, appendix, pp. 9aa-10aa. Within the town of Lake Providence, which includes bulk of the Parish population, the mayor and alderman, chosen on at-large basis, were all white. A 121; see Brief for Petitioner, 3.

[55] In *White* candidates from a multi-member district were required to run for a specified "place" on the ticket, thus reducing the election to a head-to-head contest. 412 U.S. at 766. This prevents blacks from using single-shot voting, and decreases the likelihood that white votes will be dissipated among a large number of white candidates. The at-large plan accomplished the same result by requiring, with the exception of Ward 3, that a single member be elected by the population at-large to represent each ward, of which the candidate must be a resident. A 50, 97. The Attorney General in enforcing section 5 has on 26 occasions objected to the use of the place or numbered post system and on 12 occasions disapproved the use of such a residency requirement for at-large elections. United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 207-210, 400-409 (1975).

effect of the majority vote requirement[56] and anti-single shot rule.[57] It is thus clear that the district court, in approving the at-large plan, did not apply the standards established by *White* v. *Regester*.

Intervenors maintain that, for reasons articulated by the court of appeals, the record as it existed in August, 1971, contained sufficient evidence of dilution to require disapproval of the at-large plan.[58] Since the district court's decision of that date, however, circumstances have changed. Several elections have been held, the significance of which is a matter of dispute.[59] More than four years of experience have been gained as to the extent of slating and pos-

[56] 412 U.S. at 766. Such a provision assures that, if white votes are divided among several white candidates, a black candidate cannot win with a plurality. The Attorney General has repeatedly disapproved the imposition of such a requirement as discriminatory. United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 206, 400-409 (1975). The at-large plan approved by the district court was automatically subject to the state majority vote requirement. La. Rev. Stat. Ann., art. 18, § 18: 358 (1969). In the 1971 Democratic Primary for Police Jury, a black incumbent, Otis L. Virgil, sought election from Ward 3, which chooses 3 members. At the first election on November 6, 1971, Virgil, running against 6 white opponents, received the second highest number of votes cast. Because of the majority requirement, however, that was not sufficient for the nomination. A second primary was held on December 18, 1971, for two of the seats (one candidate at the first election having won a majority); with two fewer whites in the race Virgil came in third and thus lost. See Exhibit A to Supplemental Brief of Appellees, pp. 7-10.

[57] See La. Rev. Stat. Ann., art. 18, § 18:351 (1969); Petition 57, n. 25; United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, 206-07 (1975).

[58] See Petition 52-60.

[59] A number of the at-large seats were won by black candidates. Petitioners maintain this demonstrates the non-discriminatory nature of the at-large plan; intervenor contends these victories were engineered by white politicians for the purpose of influencing the instant litigation. Since the elections occurred while this case was on appeal, the record contains nothing which would enable this Court to determine which contention is correct.

sible unresponsiveness of officials chosen under the at-large plan. The practice of affirmative racial discrimination may have waxed or waned since 1971. Doubtless there have been changes in population and voter registration over this period of time. Under these circumstances it would be unnecessary and inappropriate for the Court to decide how the district court, applying the correct standards, should have resolved this case in 1971. Any such retrospective decision would be advisory in nature, since on remand either party could seek to alter an injunctive order based on 1971 facts in view of intervening developments. To the extent that disposition of this case requires resolution of the constitutional issue, that should be done in the first instance by the district court on remand, applying the correct legal standards to the circumstances which now exist.

IV.

This Appeal Is Moot.

This matter arises on appeal from an order entered on August 2, 1971, by the district court directing that elections for the Police Jury and School Board be held on an at-large basis. A 97.

Subsequent to the entry of that order, and while the appeal was pending before the Fifth Circuit, several developments occurred. Defendants' witnesses in July, 1971, had testified that the use of at-large elections would not result in the defeat of the incumbent black Jurymen, but would lend to the election of more minority officials. A 108, 118. In November, 1972, however, both incumbent blacks were defeated, and whites captured 8 of the 9 seats on the Police Jury. Second, in the months after the August, 1971, decree, the Attorney General repeatedly interposed objections to proposals from various Louisiana parishes to switch from single-member districts to at-large or multi-member dis-

tricts.[60] Third, in *Hall* v. *Issaquenna County Board of Supervisors,* 453 F.2d 404 (5th Cir. 1971), the Fifth Circuit correctly indicated that federal courts were to avoid, where possible, the use of at-large elections, and should take care lest resort to redistricting litigation be used to subvert the Voting Rights Act.[61]

In view of these developments, intervenor moved the district court for an order modifying the injunction of August 2, 1972. On March 27, 1972, the district court concluded that at-large elections in East Carroll Parish "operate to the disadvantage of blacks, and places a serious and unnecessary handicap to effective participation of the newly enfranchised black citizens". The Court also expressed doubts as to the propriety of ordering at-large elections on other than a temporary basis, especially in view of the Attorney General's repeated disapproval of such plans in similar Louisiana parishes. The district court therefore granted intervenor's motion, and ordered that future elections be held on a ward system proposed by intervenor.[62]

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[60] United States Commission on Civil Rights, The Voting Rights Act. Ten Years After, pp. 404-406 (1975). Between July 1971 and December 1971 the Attorney General disapproved 3 at-large police jury plans, 1 at-large school board plan, 3 multi-member district police jury redistricting plans and 2 multi-member school board redistricting plans, all from Louisiana parishes.

[61] The district court in *Hall* had ordered at-large elections; plaintiff appealed, urging that single member districts should be ordered where possible and that any plan required approval under section 5. The Fifth Circuit, in an unreported decision, sustained these contentions and ordered that "upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the state of Mississippi in the five (5) respective districts (beats) of Issaquenna County for the selection of a Board of Supervisors in compliance with the Voting Rights Act of 1965, 42 U.S.C. §§1973, et seq., and in compliance with the one-man-one-vote mandate of the United States Supreme Court." Order dated July 29, 1971; slip opinion, p. 2.

[62] The district court's order is set out in the appendix to this brief, 1aa-5aa.

In view of this new order, intervenor moved the Court of Appeals to dismiss his appeal from the order of August 2, 1971, and to remand the case for appropriate further proceedings. The defendants appealed from the March 27, 1972, decision. This new appeal and motion were consolidated with the first appeal. The original panel considering this case on appeal divided as to the significance of the March 27 order; two members of the panel concluded it was void for want of jurisdiction, the third member thought that the case should be remanded because the district court had become "dissatisfied with its own choice of a plan."[63] The Fifth Circuit, *en banc,* did not consider the March 27 decision.

Intervenors suggest that, in view of the district court's order of March 27, 1972, this appeal is now moot. The district court had the inherent power to modify its own injunction. *United States* v. *Swift & Co.,* 286 U.S. 106, 114 (1932).[64] The exercise of this power presents certain complications when the injunction whose modification is sought is also the subject of a pending appeal. Under such circumstances the established and preferred practice is for the party seeking the modification to first do so in the district court; if the district court indicates it is inclined to grant

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[63] Petition, 29-30, 41.

[64] A "continuing decree of injunction directed to events to come is always subject to adaptation as events may shape the need." See also *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 298 (1941); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. (59 U.S.) 421 (1885). This authority is also encompassed by the provision of Rule 60(b)(5), Federal Rules of Civil Procedure, permitting relief from a judgment where "it is no longer equitable that the judgment have prospective application." 7 Moore's Federal Practice ¶ 60.26[4]. The 1971 proceeding in the instant case resulted from a suggestion by the court that it might be appropriate to modify its 1968 order in view of the 1970 Census. Letter of Hon. Ben Dawkins, February 17, 1971.

the modification, the party then asks the appellate court to remand the case.[65] That is, in essence, the procedure that was followed in the instant case.

The instant appeal is, for all practical purpose, moot. The sole relief intervenors seek on appeal is abolition of the at-large plan. The district court has now indicated its determination to order future elections on a ward basis. Regardless of whether, as intervenors contend, the district court was obligated to so rule in the first instance, it certainly had and has the authority to order elections on a ward basis. There is nothing to be accomplished by resolving petitioners' assertion that the August 2, 1971 order was not "an abuse of discretion," [66] since the district court no longer wishes to exercise its discretion in that manner. Nor should the Court undertake the academic exercise of considering whether the findings contained in the August 2, 1971 order, long since repudiated by the district court, could have been sustained. This Court's powers of judicial review are exercised as a matter of necessity; it is inappropriate to pass on the propriety of an order disavowed over two years ago by the district court which first issued it, just as it would be inappropriate to consider the constitutionality of a statute which had been repealed. *Sanks* v. *Georgia*, 401 U.S. 144 (1971); *Board of Flour Inspectors* v. *Glover*, 160 U.S. 170 (1895).

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[65] At least eight circuits have adopted this approach. *Innarelli* v. *Morton*, 463 F.2d 174 (3rd Cir. 1972); *Canadian Ingersoll-Rand Co.* v. *Peterson Products, Inc.*, 350 F.2d 18 (9th Cir. 1965); *Aune* v. *Reyndeis*, 344 F.2d 835 (10th Cir. 1965); *Krock* v. *Electric Mortogate Co.*, 339 F.2d 73, 74, n.1 (1st Cir. 1964); *Ryan* v. *U.S. Lines Co.*, 303 F.2d 430 (2d Cir. 1961); *Banks Mfg. Co.* v. *Ransburg Electric-Coating Corp.*, 281 F.2d 252 (7th Cir. 1960); *Ferrell* v. *Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955); *Smith* v. *Pollin*, 194 F.2d 349 (D.C. Cir. 1952); see also Wright and Miller, Federal Practice and Procedure, §2873.

[66] Brief for Petitioner, p. 17.

CONCLUSION

For the above reasons the judgment of the Court of Appeals should be affirmed; in the alternative, the order of the district court entered August 2, 1971, should be vacated, and the case remanded with instructions that the district court refer any proposed districting plan to the Attorney General for review under section 5 of the Voting Rights Act.

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APPENDIX

Order of United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 13927

CHARLES F. ZIMMER,
Plaintiff,

STEWART MARSHALL,
Plaintiff-Intervenor,

versus

JOHN J. McKEITHEN, et al.,
Defendants.

On August 7, 1971 this Court entered an order approving at-large parish-wide elections for the Police Jury and School Board of East Carroll Parish. Subsequent decisions, particularly of the United States Court of Appeals for the Fifth Circuit, have convinced this Court that at-large elections in for a parish with a sizable black population and a history of denial of the vote to black citizens, is constitutionally impermissible and is without valid Louisiana Statutory authority. Having received the various alternative plans proposed by plaintiff-intervenor and defendants at the July 29, 1971 hearing, the Court finds that the nine-member four district plan submitted by plaintiff-intervenor is far superior to all other plans submitted by plaintiff-intervenor is far superior to all other plans submitted both from the one-man one-vote point of view, and from the point of view of avoiding racial gerrymandering. Accor-

dingly, the Court makes the following finding of facts and conclusions of law:

1. That according to the 1970 United States Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other classifications; that the black population of East Carroll Parish, Louisiana comprises 58.7% of the total population.

2. That until very recently, no blacks had been allowed to register to vote in the East Carroll Parish. As this Court noted in *United States* v. *Manning*, 205 F. Supp. 172 (W.D. La., 1962), as of 1962 not a single black person had been registered in East Carroll Parish since 1922.

3. That prior to at-large elections, the single-member ward system of elections has produced two black members of the Police Jury and one black member of the School Board.

4. That although at-large elections in East Carroll Parish may not entirely preclude the possibility of a black being elected, it operates to the disadvantage of blacks, and places a serious and unnecessary handicap to effective participation of the newly enfranchised black citizens of East Carroll Parish.

5. The fact that East Carroll Parish did not attempt to change to at-large elections until blacks were registered and had been elected from certain wards, supports the Court's finding that at-large elections in East Carroll Parish are racially discriminatory in purpose or effect.

6. Although many parishes in Louisiana have attempted to change to at-large elections after blacks became registered in significant number due to the Voting Rights Act of 1965, none of these attempts have passed federal scrutiny. In all instances known to this Court, the at-large plans have been struck down either by the Attorney General of the United States acting pursuant to Section 5 or by the Courts.

7. It is questionable in view of the United States Attorney General's objection to Louisiana Acts 445 and 561 of 1968 whether the defendants have authority under Louisiana Law to adopt an at-large plan and whether the Court would have the discretion to order such a plan as other than a temporary[1] measure.

8. Given the long history of disenfranchisement of blacks in East Carroll Parish, the timing of the at-large plan, and the serious obstacles it places to the election of blacks in East Carroll Parish, the Court finds that the at-large plan is violative of the Fifteenth Amendment of the United States Constitution.

9. In *Hall* v. *Issaquena County Board of Supervisors*, the district court allowed at-large elections. The Fifth Circuit by order of July 29, 1971 ordered that the District Court order elections by election districts (beats). By *per curiam* opinion of December 29, 1971, 453 F.2d 404 (1971) the case was returned to the District Court with instruc-

[1] *Sheffield* v. *Itawamba County*, 439 F.2d 35 (5th Cir., 1971) appears to allow the district court discretion in a non-racial context and as a temporary expedient. However, since this Court finds the East Carroll at-large plan violative of the Fifteenth Amendment, is it unnecessary to reach the *Sheffield* question.

tions to proceed in accordance with the July 29, 1971 order. There is no doubt after *Hall* that at-large elections are impermissible in East Carroll Parish.

Accordingly, IT IS ORDERED that the East Carroll Parish Police Jury and School Board, be and hereby are apportioned as described as follows and with attached maps:

Voting District	*Number of Representatives*	*Enumeration Districts*	*Population*	*% Black*	*% Deviation*
1	1	2, 9 (part west of highway #596)	1,445	44.6%	+0.09%
2	2	1, 4, 5, 3 (north part), 9 (part east of highway #596)	2,830	61.8%	—1.19%
3	4	6, 7, 8, 10 12, 3 (south part)	5,631	69.3%	—1.78%
4	2	11, 13, 14, 15	2,978	43.0%	+3.98%

Ideal Population:	1,432
Maximum Deviation:	3.98%
Average Deviation:	1.95%
Total Deviation:	5.76%

MAP COLOR CODE

Voting District	*Color*
1	Red
2	Green
3	Yellow
4	Orange

IT IS FURTHER ORDERED that the Police Jury elections conducted under the at-large plan are null, void and of no effect.

IT IS FURTHER ORDERED that elections for *all* members of the East Carroll Police Jury and School Board shall be conducted under the districting plan contained in this order at the regularly scheduled 1972 Congressional elections commencing in August, 1972. Terms of office for the School Board members shall be staggered as required by Louisiana Law, with candidates running for two, four and six terms in the 1972 elections. Selection of two, four and six year seats on the School Board shall be determined by lot at a public drawing to be held before commencement of the qualifying period. Members of the Police Jury and School Board who are elected in the 1972 elections shall assume office as soon as the elections are final. If necessary members who are presently holding office on the Police Jury and School Board will hold over in office, until the 1972 elections are final.

THUS DONE and SIGNED at Shreveport, Louisiana this 27th day of March, 1972.

/s/ BEN C. DAWKINS, JR.
United States District Judge

United States District Court
Eastern District of Louisiana

This is to certify that the above anud foregoing contained on this and preceding 7 pages is a true and correct copy of the original.

3-27-72
ANTON L. CURTIS
Clerk

By /s/ TROY S. SANDERLIN
Deputy Clerk

Letter Dated September 26, 1969

June 26, 1969

The Honorable Jack P. F. Gremillion
Attorney General of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reference to Act 445 and Act 561 enacted by the Louisiana State Legislature at the 1968 Regular Session, copies of which were submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965.

We have carefully examined and considered this matter. These amendments place in the hands of existing police juries and school boards broad discretion in redrawing the boundaries of police jury wards and establishing special school board election districts, and in determining the manner of electing members of those particular bodies. On the basis of the information before me, I have concluded that the new procedures that both acts provide for have had and, if widely implemented, will have the effect of discriminating against Negro voters on account of their race, and of denying to them an effective voice in the selection of police jury and school board members. In the absence of information showing the contrary I must, on behalf of the Attorney General, interpose objection to the implementation of Acts 445 and 561.

Should you wish to present justification for the changes in election procedures provided for by the acts, or proposed procedures which will insure against racially discriminatory effects in their implementation, the Attorney General

will gladly reconsider his position. Of course, as provided for by Section 5 of the Voting Rights Act, you have the alternative of instituting an action in the United States District Court for the District of Columbia for declaratory judgment that such changes in election and voting procedure do not have the purpose and will not have the effect of denying and abridging the right to vote on account of race or color.

Sincerely,

Jerris Leonard
Assistant Attorney General
Civil Rights Division

Letter Dated September 10, 1969

Sep 10 1969

Honorable Jack P. F. Gremillion
Attorney General of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reply to your letter of July 1, 1969, in which you requested that we delineate our specific objections to the implementation of Acts 445 and 561 of the 1968 Regular Session of the Louisiana Legislature.

Our examination of this legislation discloses that Act 445 removes the previous requirement for the creation of a minimum number of police jury wards within a parish, thus permitting a police jury to redistrict a parish into one parish-wide ward. Therefore, we construe this Act as permitting a change from ward to at-large voting in police jury elections. Act 561 specifically provides for a change to at-large voting for school board members.

In the case of *Fairley* v. *Patterson*, 393 U.S. 544 (1969) involving a change from district to at-large voting for county supervisors in Mississippi, the Supreme Court held that such a change constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965. In its opinion, the Court stated as follows:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition of casting a ballot. • • • Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

Based upon the 1960 Census, we found that of the 64 parishes in Louisiana, only 5 have Negro majority voting age populations. Of the 59 parishes having white majority voting age populations, 34 have a combined total of 109 wards where the Negro population is in the majority. Thus, it is apparent that a change from ward to at-large voting in these parishes would have the effect of diluting the actual or potential voting power of the Negro inhabitants.

An example of such dilution has taken place in East Carroll Parish. Our available statistics show that in that parish, the number of registered white voters exceeds the number of registered Negro voters. However, in several of the wards, including wards 1 and 3, Negro voters outnumber white voters. Prior to a recent reapportionment suit (*Zimmer* v. *McKeithen*, Civil Action No. 13927, W.D., La., December 2, 1968), all police jury and school board members were elected by the voters of their respective wards. According to our records, in 1966, a Negro candidate was elected to membership on the school board from ward 3. In 1967, two Negroes were elected to the police jury from wards 1 and 3.

On November 18, 1968, the East Carroll Parish Police Jury, in special session, adopted a resolution which provided that all new police jurors be elected at-large throughout the parish. This resolution was incorporated in the reapportionment order and extended thereby to include all new school board members. Since this decision, two Negro

Letter Dated September 10, 1969

candidates for school board offices, one from ward 1 and the other from ward 3, have been defeated in at-large elections.

We furthe note that under the provisions of Act 561, any concentration of Negro voting power would be subject to dilution by the creation of special school board election districts, the boundaries of which need have no relation to existing or future ward boundaries.

Since neither of the Acts contain any safeguards against abuses, and in view of the opportunities afforded by the Acts to discriminate against Negro voters, we must reaffirm our objections to their implementation. However, we reiterate that should you wish to present justification for the changes or propose procedures which will insure against racially discriminatory effects in their implementation, the Attorney General will gladly reconsider his position.

Sincerely,

JERRIS LEONARD
Assistant Attorney General
Civil Rights Division

Letter Dated February 21, 1972

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

JACK P. F. GREMILLION
ATTORNEY GENERAL

February 21, 1972

Honorable John F. Ward, Jr.
Attorney at Law
206 Louisiana Avenue
Baton Rouge, Louisiana 70802

Re: LRS 17:71.1 through 71.6 (Act. 561, 1968 as amended by Act 319 of 1970)

Dear Mr. Ward:

Pursuant to the request contained in your letter of February 9, 1972, I have reviewed Act 561 of 1968 as amended by Act 319 of 1970, which is incorporated in the Revised Statutes as LRS 17:71.1 through 71.6 and previous correspondence with the United States Attorney General and am satisfied that the language contained in Section 71.6 of Title 17 of the Louisiana Revised Statutes setting forth the intent and purpose of the Legislature in enacting Act 561 of 1968, as amended by Act 319 of 1970, requires any reapportionment plan adopted by a School Board under authority of said act to comply with applicable decisions of the United States Supreme Court regarding reapportionment and non-discriminatory practices and procedures in the elective process.

Letter Dated February 21, 1972

It is my opinion that although local School Boards may, in reapportioning themselves, provide special election districts different from police jury wards and may also provide for more than one member to be elected at large from such districts (multi-member districts), it is implicit that under these acts this must be accomplished in a manner which complies with applicable Supreme Court decisions as to the one man-one vote rule and nondiscriminatory practices and procedures in the elective process.

It is further my opinion that Section 5 of the Voting Rights Act of 1965 (42 USCA 1973(c)) requires each local School Board to submit proposed changes in their election procedure, including reapportionment plans, to either the United States District Court for the District of Columbia for a declaratory judgment or to the United States Attorney General for consideration, in compliance with the terms and procedures set forth in that Act and applicable decisions of the United States Supreme Court prior to any implementation of such change. See United States Supreme Court decision in *Perkins* v. *Matthews*, 915 S. Ct. 431 (1971).

With kindest personal regards, I am

Very truly yours,

/s/ JACK P. F. GREMILLION
Jack P. F. Gremillion
Attorney General of the State of Louisiana

JPFG:eb
cc: Governor John J. McKeithen
Mr. James D. Prescott
Mr. William J. Dodd

Letter Dated February 22, 1972

LAW OFFICES
BURTON, ROBERTS & WARD
BATON ROUGE, LOUISIANA

206 LOUISIANA AVENUE
BATON ROUGE, LOUISIANA 70802
TELEPHONE: 344-0527

February 22, 1972

PERSONAL

Mr. David Norman
Justice Department
Washington, D.C.

Re: Reconsideration of Previously Interposed Objection to Act 561 of 1968 as amended by Act 319 of 1970 of Louisiana Legislature

Dear Mr. Norman:

Please have reference to our previous correspondence and conferences regarding a reconsideration of the objection previously interposed by the Attorney General to Act 561 of 1968 of Louisiana Legislature as amended by Act 319 of 1970 (LRS 17:71.1-71.6).

In connection therewith I hereby enclose a copy of an opinion of the Attorney General of the State of Louisiana which clearly holds that:

(1) These Acts require that reapportionment plans or election procedure changes adopted by School Boards

Letter Dated February 22, 1972

pursuant thereto must comply with United States Supreme Court decisions regarding reapportionment and non-discriminatory practices in the elective process; and

(2) That such plans or changes in the elective process must be submitted by the School Boards to either the District Court for the District of Columbia or to the Attorney General in compliance with the procedures set forth in Section 5 of the Voting Rights Act of 1965.

In view of this opinion of Louisiana's Chief Legal Officer, we respectfully request the Attorney General to reconsider his previously interposed objection to the above mentioned Acts of the Louisiana Legislature.

Many School Boards are attempting to voluntarily comply with Section 5 of the Voting Rights Act and reapportionment decisions of the Supreme Court but are unable to do so due to the decision in *Dyer* v. *Love,* 307 F.Supp. 974 (1969), as interpreted by your office, which casts doubt as to the authority of such boards to reapportion as long as the Attorney General's objection to these acts remains in effect.

Almost all School Boards in Louisiana are scheduled to have elections for approximately one-third of their members in primary elections this summer. It is essential that they accomplish reapportionment prior to those elections.

Consequently, we would appreciate your reconsidering your previous objection to the referred to Louisiana Legislation and, as time is of the essence, will appreciate a determination by you prior to March 15, 1972.

Letter Dated February 22, 1972

If you have any questions concerning this matter or if we may be of assistance in expediting same, please advise.

With kindest personal regards, I am,

Very truly yours,

BURTON, ROBERTS & WARD
/s/ JOHN F. WARD, JR.
John F. Ward, Jr.

JFW,Jr./sd

Enclosure

cc/enc: Mr. John Pleasant
P. O. Box 1818
Shreveport, Louisiana

Mr. James D. Prescott
Louisiana School Board Association
P. O. Box 53217, Istrouma Station
Baton Rouge, Louisiana 70805

Letter Dated April 14, 1972

April 14, 1972

Mr. John F. Ward, Jr.
Burton, Roberts & Ward
Attorneys at Law
286 Louisiana Avenue
Baton Rouge, Louisiana 70802

Dear Mr. Ward:

This is in reply to your letter of February 22, 1972, in which you request that the Attorney General withdraw his objection, interposed pursuant to the Voting Rights Act of 1965, to Act 561 of the 1968 Louisiana Legislature, as amended.

We have reviewed and reanalyzed the matter in light of the opinion of the Attorney General of Louisiana which you forwarded with your request. As I read that opinion, it interprets Act 561, as amended, to incorporate the requirement that local boards, in reappointing themselves, must comply with Supreme Court decisions regarding reapportionment and nondiscrimination in the elective process and that such reapportionment plans must be submitted pursuant to Section 5 of the Voting Rights Act prior to implementation. Based upon this interpretation of the Act, the Attorney General will withdraw his objection provided the interpretation of the State Attorney is disseminated to all school boards in the state. Therefore, I would appreciate your advising me as soon as this has been done and of the manner in which the communication was made.

Sincerely,

EDWIN L. NORMAN
Assistant Attorney General
Civil Rights Division

Letter Dated April 18, 1973

April 18, 1973

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
Department of Justice
Post Office Box 44005
Baton Rouge, Louisiana 70804

Attention: Kenneth C. DeJean, Chief Civil Division

Dear Mr. Attorney General:

This is to acknowledge receipt of your letter dated March 14, 1973 by this Department on March 26, 1973.

Members of my staff are presently making a preliminary analysis of the 149 acts specified in your letter to determine, for each of the acts, whether the information we presently have is sufficient to enable us to properly evaluate the act under Section 5 or, alternatively, whether the information we have is insufficient to allow such an evaluation of the act, in which case it will be necessary for us to request additional information relevant to the act as provided by the procedural guidelines for the administration of Section 5, 28 C.F.R. § 51.18, a copy of which is enclosed.

cc: Public File (Rm. 920)

We note that on page 2 of your March 14 letter you request that we treat as submitted under Section 5, and accordingly consider, any acts to which Section 5 applies which we may discover in the volumes you forwarded to us, in addition to those acts enumerated in your letter.

Letter Dated April 18, 1973

We believe that submission of enactments under Section 5 may not be perfected unless the legislation in question is specifically identified and particularly submitted for Section 5 review. See *Allen* v. *State Board of Elections,* 393 U.S. 544, 571; *Clayton* v. *North Carolina State Board of Elections,* 317 F. Supp. 915, 919 (E.D. N.C. 1970). We may not, therefore, unilaterally consider and evaluate pursuant to Section 5 legislation which may be contained in the volumes of state enactments but which are not individually designated in your letter of submission. We will, however, notify you of any such enactments we may discover, and, afford you the opportunity to submit the acts for review by the Attorney General or to initiate a suit for declaratory judgment in the United States District Court for the District of Columbia, as provided by Section 5.

In addition, you request in your letter of March 14 that we reconsider our objection to "Act 445 of 1969". Your letter dated March 21 seeks reconsideration of "Act 445 of 1970". It may be that you have reference to Act 445 enacted by the Louisiana legislature at the 1968 regular session, and to which the Attorney General objected on June 26, 1969.

The procedure for requesting reconsideration is set out in the Section 5 guidelines, 28 C.F.R. § 51.23. Should you wish to present information not previously available to you regarding Act 445, as addressed in the guidelines, we will be pleased to entertain your request. We note, however, that Attorney General Gremillion corresponded with us regarding our objection of June 26, 1969 in his letter of July 1, 1969; we responded in our letter dated September 10, 1969. In this connection, we also received a letter dated January 21, 1971, from Mr. John F. Ward, Jr., which

Letter Dated April 18, 1973

indicates that a carbon copy was sent to Attorney General Gremillion, offering an explanation of the facts surrounding the enactment of Act 445, the effect in Louisiana of our objection, and arguments to support a withdrawal of the objection.

As you may know, on April 14, 1972 the Attorney General withdrew his objection to Act 561, a companion bill to Act 445 involving school districts in Louisiana, also enacted in the 1968 Regular Session of the Louisiana Legislature. Prior to our letter of April 14, 1972, we had suggested that Act 561 would not continue to be objectionable if some safeguard or assurance would be provided by the State of Louisiana that the authority granted by Act 561 could not be used by local jurisdictions to circumvent the requirements of the Voting Rights Act. Such a safeguard was provided in a letter dated February 21, 1972 from Attorney General Gremillion to Mr. Ward. A copy of that letter, and of our letter of April 14, 1972, is enclosed. Should you take similar action concerning Act 445 we will, upon our receipt of such information, re-examine our position with regard to Act 445 in light of your action.

If we can assist you in gathering information necessary to make your submission complete or if you wish to discuss the matter, please do not hesitate to call on me or my staff. Robert R. Rush, the attorney assigned to this matter, can be reached by caling 20[illegible]739-3882.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division